
COMMENT

LANGUAGE, NATIONAL ORIGIN, AND EMPLOYMENT DISCRIMINATION: THE IMPORTANCE OF THE EEOC GUIDELINES

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits, among other things, discrimination on the basis of national origin.¹ Over the past several decades, numerous individuals have challenged English-only language policies by claiming that they are discriminatory and have a disparate impact on certain national origin groups.² These individuals argue that English-only policies create a hostile work environment, which constitutes discrimination with respect to conditions of employment.³ Since the Equal Employment Opportunity Commission (EEOC)⁴ guidelines on national origin discrimination state that the mere existence of an English-only policy is sufficient to establish a *prima facie* case of discrimination,⁵ bilingual employees rely on these guidelines to establish a claim of disparate impact discrimination.⁶ Under the guidelines, the employees do not have to prove that the policy has any substantial adverse impact in order to shift the burden to the employer; they simply must show that the employer has an Eng-

¹ Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2008) (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .”).

² See, e.g., *Maldonado v. City of Altus*, 433 F.3d 1294, 1298 (10th Cir. 2006) (discussing the legality of Oklahoma City’s English-only policy for employees), *abrogated on other grounds by Burlington N. Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993) (discussing a California meat-distribution company’s English-only policy); cf. EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. §§ 1606–1606.1 (2008) (defining national origin discrimination as “the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group”).

³ See *Maldonado*, 433 F.3d at 1303 (noting that the plaintiffs alleged that the English-only policy created a work environment “that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993))).

⁴ The EEOC is the government agency with enforcement authority over Title VII of the Civil Rights Act of 1964 as well as all of the Civil Rights Act of 1991, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, certain sections of the Rehabilitation Act of 1973, and Titles I and V of the Americans with Disabilities Act of 1990. See U.S. Equal Employment Opportunity Commission (EEOC), Laws Enforced by the EEOC, <http://www.eeoc.gov/policy/laws.html> (last visited Mar. 15, 2009).

⁵ See 29 C.F.R. § 1606.7(a)–(b) (2008) (declaring that those English-only policies that apply at all times, including on breaks, should be automatically subjected to strict scrutiny, whereas policies that only apply to part of the work day should still place the burden on the employer to show a business-necessity justification).

⁶ See, e.g., *Maldonado*, 433 F.3d at 1305; *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 913 (N.D. Ill. 1999).

lish-only policy in place to establish the adverse impact. Courts, however, have been divided on whether to grant deference to these guidelines.⁷

Although national origin claims are not as common as those made under many other Title VII protected class categories,⁸ they are likely to become increasingly important. Immigration is an extremely salient political topic,⁹ and as the number of bilingual employees in the

⁷ *Compare Spun Steak*, 998 F.2d at 1489 (rejecting explicitly the EEOC guidelines), *with Maldonado*, 433 F.3d at 1305-06 (affording the guidelines some respect, as a form of guidance), *and EEOC v. Premier Operator Servs., Inc.*, 75 F. Supp. 2d 550, 556 (N.D. Tex. 1999) (giving the guidelines “great deference”).

⁸ From 1997 through 2007, national origin discrimination charges increased from being alleged in 8.3% of all EEOC filings to 11.4% of filings. During this same period, charges of race and sex discrimination have each been present in over 30% of EEOC charges, and allegations of age and disability discrimination have each been alleged in approximately 20% of filings. EEOC CHARGE STATISTICS: FY 1997 THROUGH FY 2007 (2008), *available at* <http://www.eeoc.gov/stats/charges.html> (last visited Mar. 15, 2009). Importantly, the EEOC calculates the percentage of charges in which a claim of each type is alleged, rather than the percentage of total claims that each type comprises. Because many charges contain multiple claims, the percentages calculated by the EEOC can add up to well over 100%. In 1997, for example, there were 80,680 charges brought, though there were 131,967 total claims. *Id.* The percentages applied in this Comment are those used by the EEOC, meaning that 5.1% of the charges brought in 1997 contained at least one allegation of discrimination on the basis of national origin.

⁹ The immigration issue was repeatedly front-page news in the *New York Times* over the late spring and early summer of 2007. *See, e.g.,* Carl Hulse, *Kennedy Plea Was Last Gasp for Immigration Bill*, N.Y. TIMES, June 9, 2007, at A1; Robert Pear & Michael Luo, *Critics in Senate Vowing to Alter Immigration Bill*, N.Y. TIMES, May 22, 2007, at A1; Robert Pear & Jim Rutenberg, *Senators in Bipartisan Deal On Broad Immigration Bill*, N.Y. TIMES, May 18, 2007, at A1. In addition, among Republican voters, the issue consistently polled as an important issue in the early parts of the 2008 primary elections. *See Election Center 2008: Primary Exit Polls*, CNN, Jan. 8, 2008, <http://www.cnn.com/ELECTION/2008/primaries/results/epolls/index.html#NHREP> (showing that immigration was a close third in the list of most important issues to Republican primary voters in New Hampshire); *Election Center 2008: Primary Exit Polls*, CNN, Jan. 3, 2008, <http://www.cnn.com/ELECTION/2008/primaries/results/epolls/#val=IAREP> (noting that the top concern of 33% of Republican caucus-goers in Iowa was immigration). Although the economy dominated the general election (with 57% of potential voters deeming it the most important election issue), 5% of likely voters still considered illegal immigration to be the most important issue when deciding how to vote. *Election Center 2008: Election Tracker: Candidate Polling*, CNN, Nov. 4, 2008, <http://www.cnn.com/ELECTION/2008/map/polling>. Further, one poll in late October 2008 found that 26% of U.S. voters were “angry about the current immigration situation,” and 74% thought that the government was “not doing enough to secure the nation’s borders.” *26% Angry About Immigration, The Issue Candidates Ignore*, RASMUSSEN REPORTS, Oct. 23, 2008, http://www.rasmussenreports.com/public_content/politics/current_events/immigration/26_angry_about_immigration_the_issue_candidates_ignore. Given that

country continues to expand, the legality of English-only policies will continue to gain importance.¹⁰ In addition, committees in both the Senate and the House are considering amendments to Title VII, including proposals specifically targeted to “[p]rovide relief for workers, regardless of immigration status, who are victims of labor and employment law violations.”¹¹ Such bills would only further increase the reach of Title VII to bilingual employees and reaffirm the topic’s growing importance. In light of the disagreement between circuit courts in their national-origin-discrimination jurisprudence and the likelihood of a continued increase in such complaints, it is time for the Supreme Court to determine both the scope of national origin discrimination under Title VII as well as the level of deference that is due to the EEOC guidelines on the subject.

This Comment focuses specifically on the application of the EEOC guidelines to bilingual employees, as it is in these cases that plaintiffs rely most heavily on the guidelines to demonstrate an adverse impact. Part I examines the jurisprudence of national origin discrimination against bilingual speakers. Part II then addresses the level of deference due the EEOC guidelines under standard administrative law. Finally, Part III analyzes the advantages of following the EEOC guidelines from both a theoretical and a practical standpoint, and it compares the treatment of national origin discrimination claims to those of race and sex discrimination. The EEOC guidelines represent a thoughtful and well-reasoned approach to national origin discrimination and should receive the standard deference granted to interpretative rules issued by administrative agencies.

the immigration issue was not resolved, Congress will almost inevitably revisit the topic in the coming years.

¹⁰ See EEOC COMPLIANCE MANUAL § 13-I, available at <http://www.eeoc.gov/policy/docs/national-origin.html> (citing the statistic that 38% of new jobs were filled by immigrants between 1990 and 1998 and declaring that “[a]s the composition of the American workforce continues to change, Title VII’s prohibition against national origin discrimination has become increasingly significant in ensuring equality in employment opportunities”). In addition, there is evidence that English-only policies themselves are becoming more important, as the number of policy-related suits filed increased from 30 in 1996 to over 120 in 2006. Tresa Baldas, *English-Only Workplace Policies Trigger Lawsuits*, NAT’L L.J., June 18, 2007, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1182194749541>.

¹¹ Press Release, Senator Benjamin L. Cardin, Cardin and Mikulski Co-Sponsor Civil Rights Act of 2008 (Jan. 25, 2008) (on file with author); see also S. 2554, 110th Cong. (2008); H.R. 5129, 110th Cong. (2008) (stating that the purpose of the bill itself was “[t]o restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes”).

I. THE EVOLUTION OF ENGLISH-ONLY JURISPRUDENCE:
FROM *GLOOR* TO *MALDONADO*

Workplace discrimination under Title VII can take two forms: disparate treatment or disparate impact.¹² Disparate treatment is generally thought of as the more standard, straightforward type of discrimination; a showing of disparate treatment requires the plaintiff to demonstrate that there has been unequal treatment (uneven pay or different conditions of employment, for example) that is based on protected-class status (race, color, religion, sex, or national origin).¹³ In disparate treatment cases, it is necessary to prove that the employer acted with a discriminatory animus.¹⁴

Most cases that challenge English-only language policies, however, are disparate impact cases. To establish a *prima facie* case, the plaintiff must show that a seemingly neutral policy or practice has a significant adverse impact on a protected class of employees.¹⁵ If the plaintiff makes that showing, the burden is shifted to the employer to demonstrate a business necessity for the alleged practice.¹⁶ Importantly, under the disparate impact theory it is not necessary to prove that the employer intended the discriminatory impact.¹⁷

The major federal circuit court cases dealing with English-only policies—and the district courts' application of these decisions—were decided over a period of several decades, and they are interspersed with the issuance of the EEOC guidelines and congressional amendments to Title VII. Overall, courts range in their treatment of the guidelines from those that have held that the guidelines deserve no deference¹⁸ to those that have held that they must receive “great def-

¹² *Spun Steak*, 998 F.2d at 1484 (“Thus, a plaintiff alleging discrimination under Title VII may proceed under two theories of liability: disparate treatment or disparate impact.”).

¹³ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (listing the four elements that a plaintiff must prove to establish a *prima facie* case of a failure-to-hire claim under Title VII).

¹⁴ See *Spun Steak*, 998 F.2d at 1484 (requiring discriminatory intent in disparate treatment cases).

¹⁵ *Id.* at 1486.

¹⁶ *Id.*

¹⁷ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988) (stating that “some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent”).

¹⁸ See, e.g., *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 735 (E.D. Pa. 1998) (“[T]he EEOC Guidelines must be disregarded.”).

erence.”¹⁹ A brief chronological summary of the evolution of the English-only jurisprudence is helpful in shedding light on the issues that courts face today.

A. Gloor and the EEOC Guidelines

In 1980, the Fifth Circuit became the first federal appellate court to address the issue of English-only policies and national origin discrimination, and it did so in the context of a disparate treatment claim.²⁰ In *Garcia v. Gloor*, the court addressed whether national origin discrimination was broad enough to encompass language discrimination such as English-only policies in the workplace.²¹ Garcia, who was fluent in both English and Spanish, worked at Gloor Lumber and Supply, Inc., in Texas.²² As an employee, he was subject to a rule against speaking Spanish unless with a Spanish-speaking customer.²³ When asked a question by a fellow employee, Garcia responded in Spanish in the presence of a company officer, and was subsequently discharged.²⁴ Garcia claimed that his language was a defining characteristic of his national origin, so that being denied the right to speak in his preferred language qualified as discrimination on the basis of his national origin.²⁵

The Fifth Circuit rejected Garcia’s argument, asserting that “[n]either the statute nor common understanding equates national origin with the language that one chooses to speak. Language may be used as a covert basis for national origin discrimination, but the English-only rule was not applied to Garcia by Gloor either to this end or with this result.”²⁶ While the *Gloor* court did leave open the possibility that language could be used as a proxy for national origin, and therefore that policies dealing with language *could* violate Title VII, it did

¹⁹ EEOC v. Premier Operator Servs., Inc., 75 F. Supp. 2d 550, 556 (N.D. Tex. 1999).

²⁰ *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

²¹ *Id.* at 268.

²² *Id.* at 266.

²³ *See id.* (detailing the English-only rule and noting that it did not apply to those who worked in the lumber yard or to any employee during his or her break).

²⁴ *See id.* at 266-67 (noting that although Garcia was discharged following this particular incident, the employer alleged other violations of this and other policies to justify the firing).

²⁵ *See id.* at 267 (“An expert witness called by the plaintiff testified that the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others.”).

²⁶ *Id.* at 268.

not believe that any such policy *automatically* had the adverse impact required to establish a national origin discrimination claim.²⁷ Since Garcia had not shown that the language policy was intended to eliminate members of a certain national origin from the workplace, he did not establish the discriminatory animus necessary to maintain his disparate treatment claim.²⁸

The EEOC responded to *Gloor* by issuing guidelines on the topic of national origin discrimination on December 29, 1980.²⁹ Although not complying exactly with the Administrative Procedure Act, the EEOC generally followed formal notice-and-comment rulemaking procedures in adopting these guidelines, receiving over 250 public comments.³⁰ Two sections of the guidelines in particular are noteworthy. First, in section 1606.1, the EEOC stated that “[t]he Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or *linguistic* characteristics of a national origin group.”³¹ This section directly responded to the decision in *Gloor* and makes clear that “national origin discrimination” covers discrimination on the basis of language. The second important section is 1606.7, which specifically addresses “Speak-English-Only” rules. Under this provision, if the rule only applies to part of the sphere of employment, the presence of the language policy will shift the burden and require the employer to show a business necessity for the policy.³² If, however, the rule applies at all times, including on breaks, courts should presume that the policy is burdensome and scrutinize it closely.³³

When these sections are read together, they set forth a much more stringent standard for language policies and national origin discrimination than did the Fifth Circuit’s decision in *Gloor*. Under the EEOC guidelines, any employer who wants to implement a language policy could be required to provide a business justification for doing

²⁷ *Id.* at 270.

²⁸ *Id.* at 272.

²⁹ 29 C.F.R. § 1606 (2008).

³⁰ See Michael Patterson, Note, *Garcia v. Spun Steak Company: English-Only Rules in the Workplace*, 27 ARIZ. ST. L.J. 277, 287 (1995) (“The Commission carefully solicited comments from federal entities and the public at large to assure that the process included ‘interested persons’ in ‘all stages of [the] rulemaking process.’” (alteration in original) (internal citations omitted)).

³¹ 29 C.F.R. § 1606.1 (emphasis added).

³² *Id.* § 1606.7(b).

³³ *Id.* § 1606.7(a).

so, even without the plaintiff's proving that the language was being used as a proxy for national origin (for a disparate treatment case) or that the specific policy at issue has a significant adverse impact on the group (for a disparate impact case).

B. *The 1991 Amendments and Garcia v. Spun Steak*

In 1991, Congress amended Title VII to address several cases that had been decided by the Supreme Court following the Civil Rights Act of 1964.³⁴ Most notably, these amendments required that the employer bear the burden of proving that the alleged discriminatory conduct was justified by a business necessity, and they created a provision for monetary damages in sexual harassment cases.³⁵ Although discussed during the Senate hearings, the amendments did not alter the portions of the Civil Rights Act that specifically address national origin discrimination.³⁶

Following these amendments, the Ninth Circuit became the second federal appellate court to address the issue of English-only policies in the workplace, but the first to do so since the EEOC had issued its guidelines.³⁷ The plaintiffs in *Garcia v. Spun Steak* were bilingual employees who worked in a meat-packaging factory.³⁸ After English-speaking employees complained that they were being harassed in Spanish by their co-workers, the company instituted an English-only policy for all work-related activities.³⁹ Following the implementation

³⁴ See H.R. REP. NO. 102-40(II), at 23-32 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 (declaring that one of the main functions of the amendments was to overturn *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)); *see also* *Steinle v. Boeing Co.*, 785 F. Supp. 1434, 1436 n.3 (D. Kan. 1992) (stating that the purpose of the 1991 amendments was to overturn various provisions of the following: *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); *Wards Cove*, 490 U.S. at 642; and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). The provisions that were overturned generally involved issues of when damages were recoverable and what burdens would be borne by which party throughout the litigation.

³⁵ H.R. REP. NO. 102-40(II).

³⁶ The fact that these sections were discussed during debate has an important bearing on the level of deference due the EEOC guidelines. *See infra* subsection II.B.2.

³⁷ *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

³⁸ *Id.* at 1483.

³⁹ *See id.* ("[I]t is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not

of the policy, the plaintiffs sued, alleging that the English-only policy violated Title VII because it had a disparate impact on Spanish-speaking employees.⁴⁰

The Ninth Circuit held that adopting an English-only language policy was neither violative of Title VII as a matter of law,⁴¹ nor on the facts pled in the specific case.⁴² Of more interest, however, was the court's refusal to shift the burden to the employer and require it to show a business necessity for the policy upon a demonstration that an English-only rule was in place.⁴³ In leaving this burden with the plaintiffs, the Ninth Circuit explicitly declined to follow the EEOC guidelines.⁴⁴ The court, however, went further than merely refusing to apply the guidelines; it claimed that there was a "compelling indication" that the EEOC's interpretation was wrong and contrary to the plain language of the statute.⁴⁵

Since the court did not apply the EEOC guidelines, it was required to determine if the plaintiffs had demonstrated a substantial adverse impact. The court concluded that they had not, since the plaintiffs were bilingual and could have chosen to speak English.⁴⁶ Without a showing of an adverse impact, the plaintiffs failed to present a *prima facie* case of national origin discrimination, and the employer was not required to show a business necessity for the policy.⁴⁷ Under the Ninth Circuit's decision not to follow the EEOC guidelines, employers would seemingly never be required to show a business justification for an English-only policy in a disparate impact case brought by bilingual employees, as these individuals could always choose to avoid the policy's consequences by speaking in English.

to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation." (alteration in original)).

⁴⁰ See *id.* at 1483-84 (noting that the suit was filed as a class action on behalf of all Spanish-speaking employees at the plant).

⁴¹ See *id.* at 1489 (arguing that questions of a hostile work environment are inherently fact specific and are not conducive to a *per se* rule).

⁴² *Id.* at 1490.

⁴³ See *id.* at 1489 (claiming that the existence of an English-only policy "does not inexorably lead to an abusive environment").

⁴⁴ See *id.* ("[W]e reach a conclusion opposite to the EEOC's long standing position. . . . We do not reject the English-only rule Guideline lightly. . . . But we are not bound by the Guidelines.").

⁴⁵ See *id.* at 1490 (emphasizing Congress's desire to balance the need to eliminate discrimination against its attempt to respect the independence of the employer).

⁴⁶ *Id.* at 1489.

⁴⁷ *Id.* at 1490.

C. *Maldonado v. City of Altus*

Most recently, in 2006, the Tenth Circuit addressed language restrictions and national origin discrimination in *Maldonado v. City of Altus*.⁴⁸ In this case, the city of Altus implemented an English-only policy for all of its employees for “all work related and business communications during the work day.”⁴⁹ Among the plaintiffs’ allegations was the contention that this policy created a hostile work environment for Hispanic employees.⁵⁰

The Tenth Circuit reversed the district court’s grant of summary judgment for the defendants on both the disparate impact and the disparate treatment claims.⁵¹ While the court did not definitively rule on the legal question of the amount of deference due to the EEOC guidelines (since in order to reverse the district court’s grant of summary judgment it was only required to determine that a rational juror could have found for the plaintiffs),⁵² the court did note that the EEOC guidelines were persuasive.⁵³ The court also rested its decision largely upon these guidelines.⁵⁴ Although it still was not willing to endorse wholeheartedly the EEOC guidelines, the Tenth Circuit clearly believed that an English-only policy could constitute national origin discrimination and that the EEOC guidelines provided at least persuasive evidence for the court to consider.

D. *District Court Decisions Since Spun Steak*

Since the decision in *Garcia v. Spun Steak*, eleven district court decisions have addressed whether English-only language policies constitute national origin discrimination against bilingual employees.

⁴⁸ 433 F.3d 1294 (10th Cir. 2006), *abrogated on other grounds by* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

⁴⁹ *Maldonado*, 433 F.3d at 1299 (emphasis omitted).

⁵⁰ *See id.* at 1301 (detailing the reasons that the employees considered the policy to create a hostile work environment and reviewing plaintiffs’ affidavits about their experiences under the policy).

⁵¹ *Id.* at 1316.

⁵² *Id.* at 1305.

⁵³ *See id.* at 1306 (“We believe that [the EEOC’s] conclusions are entitled to respect, not as interpretations of the governing law, but as an indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees, even if we might not draw the same inference.”).

⁵⁴ *See id.* at 1306-08 (concluding that a reasonable juror could find both that the plaintiffs had established a prima facie case of discrimination and that the defendant’s business justification was inadequate).

These cases can be grouped into three broad categories. The first group of cases finds that an English-only policy did not have an adverse impact on bilingual employees, but it does not address the relevance of, or level of deference due, the EEOC guidelines. The second category consists of those cases that recognize that an English-only policy can have an adverse impact on bilingual speakers, but that refuse to give deference to the EEOC guidelines in establishing that adverse impact. Finally, there is a series of cases that explicitly relies on the EEOC guidelines as establishing that English-only policies have an adverse impact, even on bilingual employees. A brief overview of these cases will help flesh out how courts are grappling with the guidelines and the effect that these guidelines have on case outcomes.

Only two cases have completely rejected the possibility that an English-only policy could have an adverse impact on bilingual employees. *Prado v. L. Luria & Son, Inc.*⁵⁵ was the first case decided by a district court following *Spun Steak*, and it relied heavily on *Gloor*. The court claimed that English-only rules as applied to bilingual employees did not violate Title VII since the rules had no adverse impact on those employees.⁵⁶ The court, however, did not address the level of deference due the EEOC guidelines. Instead, it found that the employer had successfully shown a business necessity for the practice and that it therefore would have prevailed even if the EEOC guidelines had applied and automatically shifted the burden.⁵⁷

More recently, in *Navarette v. Nike Inc.*, the District of Oregon also failed to reach the question of deference due the EEOC guidelines since it found that “the Ninth Circuit has held English-only policies similar to that used by Defendant were not discriminatory and did not violate Title VII with regard to bilingual employees.”⁵⁸ Therefore, in both of the district court decisions that categorically deny any adverse impact of an English-only policy on bilingual employees, the courts relied on circuit court precedent and did not analyze the issue independently.

Unconstrained by a prior circuit court ruling, several other district courts considered anew whether English-only policies could constitute national origin discrimination against bilingual employees but refused to give deference to the EEOC guidelines. The first such case was

⁵⁵ 975 F. Supp. 1349 (S.D. Fla. 1997).

⁵⁶ *Id.* at 1354.

⁵⁷ *Id.*

⁵⁸ No. 05-1827, 2007 WL 2890976, at *7 (D. Or. Sept. 28, 2007) (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993)).

Kania v. Archdiocese of Philadelphia.⁵⁹ There, the Eastern District of Pennsylvania did not go so far as to say that English-only rules applied to bilingual employees *cannot* be discriminatory under Title VII, but it held that the church's English-only policy, as applied to the plaintiff, was not national origin discrimination.⁶⁰ Further, the court noted that the EEOC guidelines should be entirely disregarded as being beyond the scope of the Commission's authority since the guidelines altered the burden-shifting formula found in the Civil Rights Act.⁶¹ While not making such an extreme statement, this was also the position taken by a District of Massachusetts judge in *Cosme v. Salvation Army*.⁶² That court emphasized that it was not bound by the EEOC guidelines,⁶³ but it still gave them some consideration, finding that the guidelines were not overly prejudicial to employers.⁶⁴ After some analysis, however, the court found that the English-only policy at issue in that case was not discriminatory.⁶⁵ While these two cases and the others in this category⁶⁶ do not definitively close the door on the possibility of bilingual employees successfully bringing suit for national origin discrimination if they are subject to an English-only policy, it can be extremely difficult for them to demonstrate an adverse impact since these courts refuse to defer to the EEOC guidelines.

The third group of district courts has relied explicitly upon the EEOC guidelines in adjudicating national origin discrimination claims, finding that English-only policies have an adverse impact on bilingual employees. The Northern District of Illinois was the first to do so in *EEOC v. Synchro-Start Products, Inc.*⁶⁷ This court declared that

⁵⁹ 14 F. Supp. 2d 730 (E.D. Pa. 1998).

⁶⁰ *Id.* at 736.

⁶¹ *Id.* at 735.

⁶² 284 F. Supp. 2d. 229 (D. Mass. 2003).

⁶³ *See id.* at 240 (stating that the EEOC guidelines offer guidance but are not binding).

⁶⁴ *See id.* (noting that the presence of an English-only policy does not always result in a successful claim for the plaintiff).

⁶⁵ *Id.*

⁶⁶ The lines of analysis presented in *Kania* and *Cosme* are representative of the cases found in this category. *See Velasquez v. Goldwater Mem'l Hosp.*, 88 F. Supp. 2d 257, 262 (S.D.N.Y. 2000) (following a similar line of analysis as *Kania* and finding that if the EEOC guidelines were read to provide a "presumption of discrimination," they would conflict with the plain meaning of the statute and would therefore be invalid); *Tran v. Standard Motor Prods., Inc.*, 10 F. Supp. 2d 1199, 1210-11 (D. Kan. 1998) (holding, prior to *Maldonado*, that the EEOC guidelines could provide guidance, but implicitly ignoring them by not finding an adverse impact despite the presence of an English-only policy—much as the court did in *Cosme*).

⁶⁷ 29 F. Supp. 2d 911 (N.D. Ill. 1999).

it “find[s] it possible to impose liability . . . perhaps even as to those bilingual employees who can ‘readily comply with the English-only rule and still enjoy the privilege of speaking on the job.’”⁶⁸ Further, the court stated that it was obliged to give “substantial weight” to the EEOC’s findings that English-only policies by themselves are enough to establish a substantial adverse impact.⁶⁹ Shortly afterwards, the Northern District of Texas decided *EEOC v. Premier Operator Services, Inc.*⁷⁰ That court found that English-only policies constituted national origin discrimination since they had a disparate impact on Spanish-speaking employees, preventing them from speaking in the language with which they were most comfortable and placing bilingual employees at a disproportionate risk of punishment.⁷¹ In addition, this court went even further than the Illinois court in claiming that the EEOC guidelines deserved “great deference.”⁷² Decisions such as these affirmatively accept and apply the EEOC guidelines to bilingual employees claiming national origin discrimination.⁷³

Other courts in the third category have been willing to use the guidelines but have been less enthusiastic in their support of them. For example, the Eastern District of New York, in *Gonzalo v. All Island Transportation*,⁷⁴ “assume[d] without deciding”—since the employer’s adequate business justification prevented the burden shifting from being dispositive—that the EEOC guidelines would apply.⁷⁵ While cases like *Gonzalo* do fall within the third category—as they both read Title VII to allow for national origin discrimination claims based on English-only policies and grant at least some deference to the EEOC guidelines—they are extremely different from those that actively advocate deference to the national origin guidelines.

Given the range of results and paths of analysis followed by the district courts in the wake of *Spun Steak* and *Maldonado*, clarity is nec-

⁶⁸ *Id.* at 913 (quoting *Garcia v. Spun Steak*, 998 F.2d 1480, 1487 (9th Cir. 1993)).

⁶⁹ *Id.*

⁷⁰ 75 F. Supp. 2d 550 (N.D. Tex. 1999).

⁷¹ *Id.* at 558.

⁷² *Id.* at 556.

⁷³ See, e.g., *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 414, 416-17 (S.D.N.Y. 2005) (applying the EEOC guidelines to establish the English-only policy’s adverse impact and the prima facie case of national origin discrimination, but finding that facilitating “communications with customers” was a sufficient business justification to allow the policy).

⁷⁴ No. 04-3452, 2007 WL 642959 (E.D.N.Y. Feb. 26, 2007).

⁷⁵ *Id.* at *2. The court in *Barber v. Lovelace Sandia Health Systems*, 409 F. Supp. 2d 1313, 1337-38 (D.N.M. 2005), also took this approach.

essary. Such clarity, however, need not wait for a ruling from the Supreme Court. The field of administrative law has already addressed many of the questions raised by the interpretation of the EEOC guidelines, and it is to this that we now turn.

II. EXPLORING THE FRAMEWORK OF ADMINISTRATIVE LAW

In determining whether or not to grant deference to the EEOC guidelines, courts are not writing on a blank slate. Rather, they are addressing these guidelines in the context of administrative law. In order to understand the courts' decisions, it is thus necessary to provide a brief overview of how these guidelines fit into the framework of administrative law.⁷⁶

A. *The Powerful Impact of Rules*

Courts have generally granted wide berth for agencies to issue rules. In *SEC v. Chenery Corp.*, the Supreme Court established that an agency is entitled to decide whether it will proceed with ad hoc adjudications or truncate the process by issuing a rule.⁷⁷ The court upheld and revisited this decision, in a slightly different context, in *Heckler v. Campbell*.⁷⁸ There, the Supreme Court reiterated that rulemaking was an acceptable practice—even for agencies with primarily adjudicatory authority—and emphasized that there did not need to be an individ-

⁷⁶ Some scholars have questioned whether courts treat rules and regulations issuing from the EEOC as altogether different from those promulgated by other agencies. See generally Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937 (2006) (arguing that the Supreme Court grants less deference to EEOC determinations than it does to other agencies because of a lack of faith that the EEOC is composed of experts on the subject and because of suspicions about the agency's agenda). This Comment does not attempt such an objective explanation of federal jurisprudence on the subject, but rather makes a normative legal argument as to why the courts should *not* treat EEOC guidelines—and more specifically its guidelines on English-only language policies—differently from how it treats regulations from other agencies or even other guidelines issued by the EEOC itself.

⁷⁷ See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”); see also *Air Line Pilots Ass’n, Int’l v. Quesada*, 276 F.2d 892, 896 (2d Cir. 1960) (upholding the FAA’s authority to issue a rule, even if it results in the deprivation of property without an individual adjudication, and noting that it is not required that every individual affected by the rule have a voice in its adoption).

⁷⁸ 461 U.S. 458 (1983).

ual determination in each case that came before an agency.⁷⁹ Therefore, in choosing to adopt and apply its guidelines rather than determine the impact of English-only rules on a case-by-case basis, the EEOC was on solid legal ground.

The decision to issue a rule, however, can have a powerful impact—one that can be seen very clearly in the case of the EEOC guidelines. When these guidelines are followed, courts apply the agency's rule—rather than the statute—directly to the conduct to determine whether there is an adverse impact.⁸⁰ In the context of national origin discrimination, if the EEOC's guidelines are followed, the employee need only show that there is an English-only policy; she need not show that the English-only policy constitutes a substantial adverse impact. Demonstrating the presence of an English-only policy would truncate the analysis by *automatically* establishing a substantial adverse impact, and it would shift the burden to the employer to establish a legitimate business necessity for the practice.

The variation between the Ninth Circuit's and the Tenth Circuit's analyses shows the difference in outcome that this seemingly minor change can have, especially for bilingual employees. The Ninth Circuit declined to find any substantial adverse impact resulting from the English-only policy, noting that the employees could comply with the policy because they were bilingual.⁸¹ The Tenth Circuit, on the other hand, relied on the expertise of the EEOC to establish that every English-only policy has a substantial adverse impact. By doing so, it bypassed the question of whether an employee's ability to comply with an English-only rule prevented that rule from having an adverse impact.⁸² The burden was then shifted to the employer, immediately placing the plaintiff in a better position. The decision, therefore, of whether or not to treat the EEOC guidelines as a rule that the courts will follow has a significant impact on the trajectory of the case. This fact was recognized by the court in *Kania*, which declared that

⁷⁹ See *id.* at 467 (claiming that although the statutory scheme anticipated individualized adjudications, there was no reason to relitigate classes of claims that did not require case-by-case attention, and thereby allowing the agency to supplement its adjudicatory power with rulemaking authority).

⁸⁰ See, e.g., *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 913-14 (N.D. Ill. 1999) (noting that the EEOC guidelines create an inference that English-only policies have an adverse impact and that this inference by itself would be sufficient to carry a discrimination claim if the employer did not advance a business justification for the policy).

⁸¹ *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993).

⁸² *Maldonado v. City of Altus*, 433 F.3d 1294, 1305-06 (10th Cir. 2006), *abrogated on other grounds by Burlington N. Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

"[w]ithout the leverage provided by the EEOC Guidelines, Kania's claim that the English-only rule amounted to national origin discrimination, as applied to her, quickly collapses."⁸³

B. *The Level of Deference Due to Agency Rules*

Not all rules deserve the same amount of deference under administrative law principles. The Supreme Court has recognized that certain standards of thoughtfulness and consistency can lead to increased deference.⁸⁴ In addition, the legislative history of an act can lend substantial support to an agency's interpretation of the statute.⁸⁵ Finally, courts have consistently granted deference to informal guidelines issued by other agencies even when they were issued following less formal processes than those used by the EEOC.⁸⁶

1. Deference Required by Supreme Court Precedent

Depending on their characteristics, individual rules issued by agencies receive different levels of deference from the courts.⁸⁷ Under *EEOC v. Arabian American Oil Co.*,⁸⁸ when determining the degree of deference to give to an agency's rule, the court should examine the thoroughness of consideration that the agency gave to the topic before issuing the rule, the validity of the agency's rationale behind the

⁸³ *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998).

⁸⁴ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991).

⁸⁵ See *United States v. Rutherford*, 442 U.S. 544, 552-53 (1979) (using legislative history and consistent administrative interpretation of the statute in question to support the agency's determinations).

⁸⁶ See, e.g., *Reno v. Koray*, 515 U.S. 50, 61 (1995) (granting deference to Bureau of Prisons's regulations).

⁸⁷ As described by one court,

[D]eference is a legal concept that allocates roles between one adjudicating tribunal and another. For example, because an agency or a trial court may be better suited to make factual findings, a reviewing tribunal may sustain those factual findings unless they are clearly erroneous, unsupported by substantial evidence, or the like. . . . Notions of deference are governed by standards of review and should not be confused with presumptions and other like procedural devices.

Universal Elecs. Inc. v. United States, 112 F.3d 488, 493 (Fed. Cir. 1997). *Chevron* deference, which requires that a court uphold an agency's interpretation of its organic statute so long as the statute is ambiguous and the agency's interpretation is a "permissible construction of the statute," is the highest form of deference for agency determinations. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁸⁸ 499 U.S. 244.

rule, and the rule's consistency with prior agency adjudications as well as the uniform application of the rule following its implementation.⁸⁹

The EEOC guidelines on national origin discrimination deserve deference since they satisfy all three factors of the *Arabian American Oil* test. On the first prong, although the guidelines are not official legislative rules, there was an extensive public-comment process. The EEOC solicited public comment before issuing its rule and received approximately 250 comments.⁹⁰ This process was certainly sufficient to ensure that the guidelines were not issued in a capricious manner but instead were the product of a careful and deliberative process that culminated in the issuance of guidelines. In addition, the middle prong—the rationale behind the Commission's guidelines—is also satisfied, as will be discussed in Section III.A. Finally, the guidelines easily meet the third prong of the *Arabian American Oil* test: the policy for dealing with English-only rules has been consistently applied since 1970, even before the interpretation was codified in sections 1606.1 and 1606.7.⁹¹ These guidelines were issued promptly after the Fifth Circuit's decision in *Gloor*, which attempted to remove language characteristics from national origin discrimination, and neither section has been amended or been subject to a revised interpretation since their issuance.⁹² The guidelines represent the expert opinion of the agency for over thirty-five years, and the EEOC has continued to hold this interpretation as it observes the guidelines working in practice. The EEOC's guidelines on national origin discrimination meet all three criteria set forth in *Arabian American Oil*, confirming that they deserve deference from the courts.

Additional Supreme Court precedent offers further support for granting deference to the EEOC guidelines. In *United States v. Rutherford*, the Court made clear that if Congress is aware of the agency's interpretation of a statute and subsequently amends the statute without amending the specific portion at issue, the Court will interpret that action as tacit congressional approval of the agency's reading.⁹³ In

⁸⁹ See *id.* at 257 (setting forth the three-prong approach and citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

⁹⁰ Patterson, *supra* note 30, at 287.

⁹¹ *Id.* at 287-88 & n.72.

⁹² Cf. Natalie Prescott, *Employers on the Fence: A Guide to the Immigratory Workplace*, 29 CAMPBELL L. REV. 181, 193-94 (2007) (decrying the fact that the EEOC continues to consider language characteristics a part of national origin).

⁹³ See *United States v. Rutherford*, 442 U.S. 544, 552-54 (1979) (asserting that the Food and Drug Administration (FDA) is meant to have jurisdiction over drugs for the

that case, the Court determined that the FDA's determination that it was authorized to regulate drugs for terminally ill patients under the Food, Drug, and Cosmetic Act deserved "substantial deference."⁹⁴ This deference was further reinforced by the congressional history, which showed a clear congressional intent to leave the agency's interpretation in place.⁹⁵ The Court supported this deference largely with appeals to separation-of-powers concerns and with respect for both the executive and legislative branches.⁹⁶

These considerations add credence to the belief that Congress intended courts to apply Title VII consistently with the EEOC's guidelines. When Congress amended Title VII in 1991, it was conscious of the EEOC guidelines, but it did not touch the portions dealing with national origin discrimination.⁹⁷ Furthermore, Congress did not simply tacitly approve the interpretation, but specifically addressed the guidelines in discussing the amendments. Two exchanges between Senators Dennis DeConcini and Edward Kennedy illustrate this point. In the first, the Senators agreed that national origin discrimination included "discrimination based upon characteristics common to a specific ethnic group, such as ancestry, culture, *linguistic characteristics—including language and speech accent*—physical characteristics, and birthplace."⁹⁸ In their second exchange, they agreed that the EEOC guidelines provided a "sound and effective method" for dealing with the problem of English-only language policies and that the amendments would not "in any way adversely affect the EEOC regulation on language use in the workplace."⁹⁹ With such a record, it is difficult to argue that Congress did not intend Title VII to be consistent with the

terminally ill since Committee Reports for the 1962 Amendments to the Food, Drug, and Cosmetic Act "note with approval" that it is current FDA policy to do so and the Amendments did not seek to change this practice); *cf.* *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983) (finding that where Congress is aware of an agency's interpretation of a statute, a failure to amend that portion of the statute provides support for the agency's interpretation).

⁹⁴ *Rutherford*, 442 U.S. at 553 (citing *Bd. of Governors of FRS v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978), and *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 304 (1977)).

⁹⁵ *See id.* at 554 ("Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives.").

⁹⁶ *See id.* (noting the Court's hesitation to go against both clear congressional intent and the interpretation of the administrative agency).

⁹⁷ *See supra* Section I.B (discussing the 1991 amendments).

⁹⁸ 137 CONG. REC. 29,051 (1991) (emphasis added).

⁹⁹ *Id.*

EEOC guidelines. This shows that, at least following the 1991 amendments to the Civil Rights Act, the EEOC guidelines were clearly in line with congressional intent. Because of this difficulty, and because the guidelines were thoughtfully developed and consistently applied, *Rutherford* and other Supreme Court precedent require that courts give the EEOC guidelines at least some deference.

2. Deference Required by Analogy

The EEOC guidelines at issue are not standard legislative rules issued by agencies; rather, they are more analogous to interpretative rules that explain how an agency intends to apply its organic statute.¹⁰⁰ Courts, however, have given similar deference to regulations issued by other agencies even when the regulations are less formal than those issued by the EEOC. In both *Reno v. Koray* and *Grassi v. Hood*, for example, the courts determined that the Bureau of Prisons's program statements deserved "some deference."¹⁰¹ In *Grassi*, in particular, the program statement was very analogous to the EEOC guidelines at issue here. There, the Bureau had listed offenses that were not considered "nonviolent" when evaluating a prisoner for early release.¹⁰² Such a ruling truncates the adjudicative process in a manner similar to the EEOC guidelines: by defining a potentially vague statutory term, such as "nonviolent" or "significant adverse impact," the focus is shifted to the factual existence of a conviction or an English-only policy, rather than to whether or not the conduct at issue falls within the statutory term. Furthermore, the Bureau of Prisons's regulations are less formal than the EEOC guidelines, as the Bureau did not undertake the notice-and-comment process that preceded the adoption of section 1606.¹⁰³

Given that courts have granted "some deference" to the Bureau of Prisons's less formal interpretative rules, it is difficult to find justification for granting no deference to the EEOC's guidelines. This stance was recognized by the First Circuit in *Arnold v. UPS, Inc.*, in which the court claimed that EEOC guidelines in general "constitute a body of

¹⁰⁰ *Black's Law Dictionary* defines an interpretative rule as "[a]n administrative rule explaining an agency's interpretation of a statute." BLACK'S LAW DICTIONARY 838 (8th ed. 2004).

¹⁰¹ *Reno v. Koray*, 515 U.S. 50, 61 (1995); *Grassi v. Hood*, 251 F.3d 1218, 1220 (9th Cir. 2001), *amended on reh'g en banc*, 260 F.3d 1158 (9th Cir. 2001).

¹⁰² *Grassi*, 251 F.3d at 1220.

¹⁰³ *E.g., Reno*, 515 U.S. at 61.

experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁰⁴ The court concluded that the guidelines on disability discrimination “deserve at least as much consideration as a mere ‘internal agency guideline,’ which the Supreme Court has held is entitled to ‘some deference’ as long as it is a permissible construction of the statute.”¹⁰⁵

From both the case law and the treatment of similar guidelines issued by other agencies, a strong argument exists for at least granting some deference to the EEOC guidelines on national origin discrimination. The guidelines were tacitly approved by Congress when it amended the Civil Rights Act in 1991, were issued following a relatively formal process, are supported by a valid rationale, and have enjoyed consistent application since their inception. Finally, the courts have repeatedly granted deference to interpretative rules, including analogous provisions promulgated by the Bureau of Prisons, even though they are significantly less formal than the EEOC guidelines.

III. THE WISDOM OF THE EEOC GUIDELINES: POLICY AND PRACTICE

In examining the rationale behind the EEOC’s approach, it is necessary to look at both the policy reasons for following the guidelines and the practical effects that the approach has had. Further, it is helpful to compare the treatment of national-origin-discrimination claims to those based on race and sex, as these are the most frequently litigated portions of Title VII and the courts have had a full opportunity to consider the EEOC guidelines on those subjects.¹⁰⁶ After examining each of these issues, it is clear that the guidelines are well supported and should be followed.

¹⁰⁴ 136 F.3d 854, 864 (1st Cir. 1998), *abrogated on other grounds by* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), *and* Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (internal quotation marks and citations omitted).

¹⁰⁵ *Arnold*, 136 F.3d at 864 (citing *Reno*, 515 U.S. at 61). *But see* Sicard v. City of Sioux City, 950 F. Supp. 1420, 1434 (N.D. Iowa 1996) (claiming that “courts have the discretion to substitute their own judgment” for that of the agency when examining interpretative rules).

¹⁰⁶ *See supra* note 8 (noting that race and sex discrimination claims each were alleged in approximately thirty percent of charges brought under Title VII between 1997 and 2007).

A. *Following the EEOC Guidelines Is Both Practical and Good Policy*

Beyond the precedential reasons for granting deference to the EEOC guidelines, there are strong policy reasons for doing so. First, most cases that raise national-origin-discrimination claims in response to an English-only policy are likely to be disparate impact cases, since the policy will apply to all employees but will only have an adverse effect on some. In this type of case, the employee is not required to show that the policy was motivated by discriminatory intent.¹⁰⁷ Because of this lower burden, the conduct at issue could be suitably regulated by a blanket rule: it is the policy itself, and not its implementation (unless the claim becomes one of disparate treatment), that is discriminatory, and policies that have a disparate impact in one setting are likely to have the same effect as those in another setting. Further, if the disparate impact that results is the creation of a hostile work environment, as is often the case with English-only policies, there is frequently little concrete proof as to how the policy affects working conditions.¹⁰⁸ In situations such as these, it might be more appropriate to deal with the issue through a general rule rather than with a case-by-case analysis that hinges on how well the employee tells a tragic story, how visible the employee's distress is from the policy, or how sympathetic the jury is to this particular plaintiff. Issuing a uniform guideline to address English-only policies is a sensible solution that will allow for both clarity and uniformity in application.

Not only is the topic of English-only policies generally well suited to an interpretative rule, but the specific rule itself is also supported by a valid rationale. The EEOC strongly believes that English-only language policies always have a substantial adverse impact on those who speak other languages. Reasons supporting this belief include the following: English-only policies may "create an atmosphere of in-

¹⁰⁷ See *supra* note 17 and accompanying text.

¹⁰⁸ In his dissent in *Spun Steak*, Judge Boochever noted that

proof of [an atmosphere of inferiority, isolation and intimidation caused by] English-only rules requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the [EEOC] guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the policy

Garcia v. Spun Steak Co., 988 F.2d 1480, 1490 (9th Cir. 1993) (Boochever, J., dissenting).

feriority, isolation and intimidation based on national origin";¹⁰⁹ these policies inherently treat bilingual speakers differently by preventing them from speaking in the language of their choice; these rules can create barriers to employment for those with limited English-language skills; these rules can prevent employees from speaking in the language in which they can most effectively communicate;¹¹⁰ and there is a disproportionate risk of punishment for bilingual speakers.¹¹¹ The policies, in other words, not only create a hostile work environment but also have potential side effects that fall solely on those who speak languages other than English, subjecting them to different terms and conditions of employment than those employees who speak only English. All the reasons offered by the EEOC could be used by individual plaintiffs to establish that they have suffered a substantial adverse impact, but when brought before different judges they might meet with varying levels of success. As a body with special expertise on the subject, the EEOC issued its national origin guidelines to ensure that these adverse impacts were recognized and adequately addressed by the courts in every case.

Further, following the EEOC guidelines does not require abandoning the standard disparate impact analysis; indeed, the two cannot be separated, as some scholars have argued.¹¹² The key point is that, for the reasons enumerated above, and following a period of public comment and deliberation, the EEOC determined that English-only language policies *always* have a substantial adverse impact on employees who speak languages other than English.¹¹³ This, however, is not the end of the analysis. As with any other practice that has an alleged disparate impact, if the employer can show a legitimate business objective (such as safety, as advocated in *Spun Steak*,¹¹⁴ or to facilitate su-

¹⁰⁹ 29 C.F.R. § 1606.7(a) (2008).

¹¹⁰ See, e.g., *Maldonado v. City of Altus*, 433 F.3d 1294, 1305 (10th Cir. 2006), *abrogated on other grounds by Burlington N. Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

¹¹¹ Cf. Amy Crowe, Comment, *May I Speak? Issues Raised by Employer's English-Only Policies*, 30 J. CORP. L. 593, 602 (2005) (discussing the phenomenon of code-switching, which suggests that bilingual individuals may not be able to fully control in what language they speak at all times).

¹¹² See Melissa Meitus, Comment, *English-Only Policies in the Workplace: Disparate Impact Compared to the EEOC Guidelines*, 84 DENV. U. L. REV. 901, 913-14 (2007) (seeking to isolate the EEOC guidelines as employing a separate form of analysis from the disparate impact analysis).

¹¹³ See *supra* Section I.A.

¹¹⁴ See 998 F.2d at 1483 (noting that non-Spanish speaking employees were distracted by the use of Spanish while using machinery, and also claiming that the policy

pervisor oversight, as advocated in *Gloor*¹¹⁵), the policy may still stand. In this way, the guidelines fit within and help define—rather than replace—the burden-shifting format established by Title VII.

The EEOC guidelines on national origin are not just good policy; they also work well in practice. The district courts, as discussed in Section I.D, have issued several rulings that have used the EEOC guidelines in various ways. Looking at these cases, a few points stand out. The first is that, in general, the district courts have either granted some deference to the EEOC guidelines or have at least used the guidelines to help inform their analyses. This point is seen most clearly in *EEOC v. Synchro-Start Products, Inc.*¹¹⁶ and *EEOC v. Premier Operator Services, Inc.*,¹¹⁷ where the courts specifically stated that the guidelines were due a substantial amount of deference. Even those courts, however, that did not feel bound by the EEOC guidelines (or that did not reach a decision as to whether or not they were bound to show any deference to them), still frequently applied the guidelines to aid their analyses.¹¹⁸ Only the Eastern District of Pennsylvania in *Kania*¹¹⁹ and the two district courts constrained by precedent refused to acknowledge the guidelines as having possible persuasive value.¹²⁰ The second point is that the presumption in favor of applying the guidelines is not outcome determinative. In only two of the five cases in which they were considered did the courts rule in favor of the employees.¹²¹ In the other three cases that applied the guidelines, courts have found a legitimate business justification for the policies, and therefore have not found them to be discriminatory; even though the guidelines applied, the outcome remained the same.¹²² Ultimately, it seems that there has been an increase in the number of courts that

would promote workplace harmony and increase the ability to communicate with factory inspectors).

¹¹⁵ See 618 F.2d 264, 267 (5th Cir. 1980) (arguing that non-Spanish speaking supervisors would not be able to perform their duties effectively if subordinates were able to speak Spanish and that customers objected to communications that they could not understand).

¹¹⁶ 29 F. Supp. 2d 911, 913 (N.D. Ill. 1999).

¹¹⁷ 75 F. Supp. 2d 550, 556 (N.D. Tex. 1999).

¹¹⁸ See, e.g., *Cosme v. Salvation Army*, 284 F. Supp. 2d 229, 240 (D. Mass. 2003).

¹¹⁹ 14 F. Supp. 2d 730, 735 (E.D. Pa. 1998).

¹²⁰ *Navarette v. Nike Inc.*, No. 05-1827, 2007 WL 2890976 (D. Or. Sept. 28, 2007); *Prado v. L. Luria & Son*, 975 F. Supp. 1349 (S.D. Fla. 1997).

¹²¹ *Premier Operator Servs.*, 75 F. Supp. 2d at 550; *Synchro-Start*, 29 F. Supp. 2d at 911.

¹²² *Gonzalo v. All Island Transp.*, No. 04-3452, 2007 WL 642959 (E.D.N.Y. Feb. 26, 2007); *Barber v. Lovelace Sandia Health Sys.*, 409 F. Supp. 2d 1313 (D.N.M. 2005); *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408 (S.D.N.Y. 2005).

are willing to consider the EEOC guidelines and that find them to be at least persuasive if not binding, but this change has not resulted in a complete tipping of the scales against the employers. Rather, it has merely shifted the focus to the business justification proffered by the employer.

The rationale behind the EEOC guidelines is valid, lending stronger support to the argument that they should be granted deference. English-only policies are appropriately suited to regulation by a rule, and the EEOC's specific guidelines are well supported. In addition, adopting the guidelines would not require a change in the discrimination analysis, but rather would fit within the existing burden-shifting formula. Finally, the guidelines work well in practice and are not prejudicial to employers. All of this supports granting deference to the guidelines.

B. *A Comparison to Race and Sex Discrimination Claims*

It is worth comparing the courts' treatment of national origin discrimination to their jurisprudence in the realms of race and sex discrimination. In both of these areas, courts have been much more willing to entertain broad statutory readings and to follow the guidelines issued by the EEOC. Since Title VII lists without differentiation the bases on which it is impermissible for employers to discriminate, the courts should interpret each of the provisions similarly and grant the same breadth to national origin discrimination as they do to race and sex discrimination.

In the area of sex discrimination, broad readings of the statute are especially prevalent. In *Price Waterhouse v. Hopkins*, the Supreme Court found that the ban on discrimination on the basis of sex included a prohibition on sex stereotyping as well.¹²³ In that case, a woman was denied a promotion not solely because she was a woman, but because she was a woman who displayed stereotypically male behavior.¹²⁴ This reading was endorsed by Congress in the 1991 amendments when it extended the holding of *Price Waterhouse* to allow recovery even in cases where an employer was only partially motivated by an improper consideration of sex and likely would have chosen not to promote or

¹²³ 490 U.S. 228, 250-52 (1989).

¹²⁴ See *id.* at 250 (asserting that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender").

hire the individual even without the invidious discrimination.¹²⁵ The relationship between sex discrimination and sex stereotyping claims is very similar to that between English-only employment policies and national origin discrimination; although not explicitly listed in the statute, English-only policies reasonably fall under national origin discrimination and received an implied endorsement from Congress when the Civil Rights Act was amended in 1991.¹²⁶

The Supreme Court has also held—although there is no mention of it in Title VII—that sexual harassment falls under sex discrimination,¹²⁷ and it more recently has concluded that even though it “was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” same-sex sexual harassment may also fall under the statute.¹²⁸ Of special interest is the use of the EEOC guidelines in determining the breadth of coverage of sex discrimination. Noting the relative dearth of legislative history, the court in *Meritor Savings Bank, FSB v. Vinson* turned to an extensive discussion of the EEOC guidelines, finding that they fully support the inclusion of sexual harassment as a type of sex discrimination and have done so consistently.¹²⁹ Again, if a similar method of interpretation was applied to a national-origin-discrimination claim, there should be no reason to believe that national origin discrimination could not encompass “language discrimination” claims. While these claims also assuredly are not the “principal evil” with which Congress was concerned, this does not mean that Title VII cannot protect them. In fact, the EEOC has consistently held that it does.

Although Title VII does not specifically address discrimination that focuses on language, the EEOC’s decision to place such conduct under the umbrella of national origin discrimination is not without merit. The Supreme Court’s willingness to read Title VII’s prohibition on sex discrimination broadly and to examine closely the EEOC guidelines for support should send a message to lower courts to do the same for national origin discrimination, especially in the face of legislative history that supports such a reading.¹³⁰

¹²⁵ See, e.g., *Greenwood v. Stone*, 136 F. Supp. 2d 368, 370 n.1 (W.D. Pa. 1992) (“Section 107 reverses the liability limitations imposed on mixed motive cases by the decision in *Price Waterhouse v. Hopkins* . . .”).

¹²⁶ See *supra* subsection II.B.1.

¹²⁷ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986).

¹²⁸ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-81 (1998).

¹²⁹ 477 U.S. at 65-67.

¹³⁰ See *supra* subsection II.B.1.

In addition, the courts have been much more willing to grant deference to the EEOC guidelines in the realms of race and sex discrimination. The Eleventh Circuit, in particular, stated that the EEOC's position that employers are liable for the conduct of their supervisory agents was entitled to "great deference" and should be adopted.¹³¹ Many district courts also have explicitly imported requirements established by the EEOC guidelines. This is most clearly apparent in situations where the employer relies on an entry test to determine employment eligibility, such as those frequently required by police and fire departments. In these cases, many courts require that the employer conform to the EEOC guidelines to meet its burden of proving that the test is not racially discriminatory.¹³² Most striking, however, is the Supreme Court's pronouncement in *Griggs v. Duke Power Co.*:

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.¹³³

If this interpretation is true in the case of the EEOC's guidelines as they relate to evaluating tests that have an alleged disparate impact on racial minorities, there is no reason that it should not also be true for determining the breadth of national origin discrimination. Given both the validity of the EEOC's interpretation and the legislative history discussed above, it is clear that, under *Griggs*, the EEOC's guidelines on national origin discrimination should be given deference.

The Supreme Court itself has broadly interpreted sex discrimination in several of its precedents, and courts, including the Supreme Court, have repeatedly granted deference to the EEOC's guidelines in evaluating race and sex discrimination claims. No persuasive reason exists for not also extending this treatment to national origin discrimination under Title VII.

¹³¹ Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1559 n.8 (11th Cir. 1987).

¹³² See, e.g., Boston Chapter, NAACP, Inc. v. Beecher, 371 F. Supp. 507, 515 (D. Mass. 1974); Vulcan Soc'y of the N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n, 360 F. Supp. 1265, 1273 & n.23 (S.D.N.Y. 1973); W. Addition Cmty. Org. v. Alioto, 340 F. Supp. 1351, 1354 & n.3 (N.D. Cal. 1972) (citing numerous cases that have applied the guidelines as such).

¹³³ 401 U.S. 424, 433-34 (1971) (citations omitted).

CONCLUSION

As a policy with solid theoretical and practical applications, the courts should grant deference to the EEOC guidelines on English-only language rules in the workplace. While *Gloor* began the departure from the EEOC's interpretation in 1980 and *Spun Steak* also declined to follow the EEOC guidelines in finding that an English-only language policy did not constitute an adverse impact, the Tenth Circuit's decision in *Maldonado* gives reason to question if the tide might be reversing. This change would bring the EEOC's guidelines on English-only policies in line with administrative law by requiring some deference for the interpretative rules that the Commission has implemented. Such a move would not only comport with administrative law, but it would be supported by Supreme Court precedent, congressional history, and the courts' treatment of similar interpretative rules. Additionally, the EEOC guidelines are good policy, and their use has not resulted in any overt favoritism of plaintiffs at the expense of their employers. Finally, when comparing the breadth of interpretation and the deference granted to the EEOC guidelines in the areas of sex- and race-discrimination claims, it becomes clear that there is no basis for not doing the same for national origin discrimination.

With the presence of a circuit split and large variance among district courts' treatment of the issue, it is time for the Supreme Court to address whether "language discrimination" can fall under national origin discrimination and what role the EEOC guidelines should play in this analysis. When examining national origin discrimination, however, it is imperative that the Court remember the purposes of Title VII—"to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group . . . over other employees."¹³⁴ The number of bilingual employees in the workforce is likely to continue to increase rapidly. In addition, the issue of national origin discrimination is likely to become a hot-button topic in the law in the coming years. With this background, and the strong reliance that bilingual employees especially place on these guidelines, it is imperative that the courts continue to recognize the expertise of agencies and allow the EEOC to regulate national origin discrimination.

¹³⁴ *Id.* at 429-30.